IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.871 OF 2006

Ismailkhan Hamidkhan Pathan ...Appellant

vs.

Pushpatraj Mishrimal Jain
(since deceased through L.Rs.)
Sanjaykumar Pushparaj Jain & Ors. ...Respondents

Mr.Shriram Kulkarni for the Appellant
Mr.Machhindra Patil for Respondent No.1

CORAM: A.S.OKA,J.
DATE : JULY 18, 2007.

P.C.:

1. Heard Advocates for the parties. The Appellant is the original plaintiff. The Appellant claims to be the owner of the land bearing Chalta No.148. According to the Appellant-plaintiff, there is a single storeyed building on Chalta No.148 and in the building, the Appellant is running a General Store. On the southern side of the said Chalta number 148, there is a lane bearing Chalta No.149 having a width of 3' X 10". Beyond the lane there is a property bearing Chalta No.150 and 151 on which the Respondents-defendants have constructed a multi storeyed building. According to the case of the Appellant-Plaintiff, in the three storeyed building constructed by the Respondents there are toilets constructed and waste water from the toilets is taken to the septic tank which has been unauthorizedly constructed in the lane. The allegation in the plaint is that the waste and dirty water is flowing out of the said septic tank and therefore, a complaint

was filed by the Appellant before the District Health Officer. A reliance was placed on communication made by the District Health Officer dated 3rd April 1996 to the Sarpanch of the local village panchayat. It is stated in the said communication that the septic tank has been unauthorizedly constructed by the Respondents and waste water is overflowing and causing nuisance to the residents of the adjoining properties. It is stated that due to flow of waste water, there is a likelihood of spread of various diseases. On the basis of the said communication, a suit was filed by the Appellant for perpetual injunction enjoining the Respondents to prevent the flow of waste water from the septic tank constructed in the property bearing Chalta No.149. Mandatory injunction is also claimed for removal of the said septic tank.

2. The trial court partly decreed the suit by passing the following order :

. "The suit is partly decreed with costs.

. The Defendants No.1/1 to 1/5 are hereby restrained from leading the drain water and waste water in the surrounding open area of Gat No.149.

. Decree be drawn accordingly."

3. An Appeal was preferred by the Appellant. The Appeal has been dismissed. However, cross objection preferred by the Respondents was allowed and the decree passed by the trial court has been set aside. The Appellate Court relied upon the evidence of Health Officer and an inspection report of the Health Officer submitted on the basis of inspection carried out during the pendency of the proceeding and held that there is no such nuisance created from the septic tank of the Respondents in Chalta No.149. The Appellate Court accepted the evidence of Respondent No.1/1 that they have provided a Shosh-Khadda (a soak pit) for the septic tank and hence there is no nuisance.

4. The learned Counsel for the Appellant invited my attention to the findings recorded by the trial court. He submitted that even the trial court has accepted that the septic tank has been unauthorizedly constructed. He placed reliance on the report of the Health Officer dated 3rd April 1996. He submitted that in view of the said report and in view of the fact that septic tank was unauthorizedly constructed, the Appellant was entitled to a decree of injunction as prayed in the suit.

5. The learned Counsel for the Respondents supported the impugned Judgment and Decree. On the instructions of Respondent No.1/1 Sanjaykumar Pushchair Jan, the learned

counsel for the Respondents stated that the Respondents will ensure that no nuisance is caused to the occupants of the adjoining properties by ensuring that there is no leakage or seepage of waste or drain water from the septic tank. He stated that as of today there is no nuisance created by the said septic tank.

6. I have considered the submissions. On the basis of the evidence of Respondent No.1/1 as well as the evidence of the District Health Officer, a finding of fact has been recorded that there is no subsisting nuisance caused by the said septic tank. It is not the case of the Appellant that he is the owner of the land bearing Chalta No.149 on which the said septic tank has been constructed. Therefore, it is not necessary to deal with the submission that the said septic tank has been unauthorizedly constructed. A reference will have to be made to the evidence of Respondent No.1/1. He has stated in his evidence that the septic tank has been constructed in the property owned by the Respondents. He has categorically stated that there is no overflow of dirty water from the septic tank. It will be also necessary to refer to the evidence of Dr.Shailesh P. Ghalvadkar who was at the relevant time the District Health Officer. He has proved in his evidence a report submitted by him at Exh.97 after carrying out the inspection of the property during the pendency of the suit. He has admitted in the cross

examination that no arrangement has been made for draining the waste water from the septic tank.

7. After considering the evidence on record a finding of fact has been recorded by the Appellate Court that no nuisance has been created by the septic tank. An assurance has been given by the Respondent No.1/1 before this court that necessary arrangement will be made by the Respondents for ensuring that there is no leakage or seepage of waste water from the septic tank. It is also stated that as of today no nuisance is created by the said septic tank. The aforesaid statements made by him through the learned Counsel for the Respondents are hereby accepted.

8. In view of the evidence on record, no case is made out for interference. It is obvious that in future if any nuisance is caused to the Appellant by the septic tank constructed by the Respondents, it will be always open for the Appellant to approach the civil court or any other authority in accordance with law for redressal of his grievances.

9. Subject to what is observed above, the Second Appeal is dismissed with no order as to costs.

JUDGE